

DATE: February 27, 1998

CASE NO: 95-INA-387

In the Matter of

BOCA RATON COMMUNITY HOSPITAL
Employer

on behalf of

VIOREL MANOLE
Alien

Appearances: Polatsek and Sclafani, by
Christopher A. Wilburn for Employer and Alien

Before: Holmes, Jarvis, and Vittone
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from Boca Raton Community Hospital's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On November 15, 1993, the Employer filed a Form ETA 750 Application for Alien Employment Certification with the Florida Department of Labor and Employment Security ("FDOLES") on behalf of the Alien, Viorel Manole (AF 106-107, 124-125). The job opportunity was listed as "Transcription Quality Coordinator". The job duties were described as follows:

Review and evaluate diagnostic clinical care records to assure delivery of optimum medical services and patient follow up. Provide reports and analyses [sic] of staff care levels, patients progress and satisfaction with clinical experience. Prepare and implement recommendations for increasing levels of service and patient care in both clinical and diagnostic setting. Develop programs for in-service staff training to enhance sensitivity to patient needs as patient passes through specific courses of treatment and evaluate staff responsiveness to expand diagnostic care levels. (AF 106).

The stated job requirements for the position, as set forth on the application, are as follows:

Bachelor's degree in Medicine or Medical Records Admin., and one year of experience in the job offered or one year of experience as a Physician. (Id.).

FDOLES determined that the appropriate classification for the position was "Quality Assurance Coordinator (medical ser.) under Dictionary of Occupational Titles ("DOT") code 075.167-014.¹ FDOLES transmitted resumes from three U.S. applicants to the Employer. (AF 94-95). The Results of Recruitment Report by the Employer indicated that none of the U.S. applicants were hired. (AF 112-113). The file was transmitted to the CO.

¹On December 7, 1993, the Employer's attorney sent a letter to the local job service stating that he agreed with the assigned DOT code. (AF 105).

The CO issued a Notice of Findings (“NOF”) on January 31, 1995, proposing to deny the certification because the Employer’s job requirements do not represent the actual minimum job requirements in violation of Section 656.21(b)(5). (AF 90-93). The CO found that:

The minimum requirements listed by the employer are not appropriate and appear to be tailored to match the qualifications of the alien. The employer is requiring a bachelor’s in Medicine, which is not granted in the United States, or Medical Records Administration, which is not commonly granted in the United States. Additionally, the employer is requiring one year experience in the job offered or one year in the related occupation Physician. The alien has the Bachelor’s in Medicine and the alternative experience as a Physician. Thus, the Certifying Officer has concluded that these are not the actual minimum requirements of the job because the requirements are not appropriate and have been tailored to match the qualifications of the alien. (AF 93).

The CO provided that the Employer could rebut this finding by documenting that these are the actual minimum requirements for the job. Specifically, the CO requested that the Employer prove the following: 1) The educational requirements are appropriate and both degrees are granted in the United States; 2) The Employer must provide the names and qualifications of previous employees that held this position; and 3) The Employer must demonstrate that the alternative experience requirement is appropriate to this position. (Id.).

The Employer’s rebuttal was dated March 6, 1995. (AF 29-89). The Employer argued that the CO mis-classified the position. The position should have been classified under DOT code 079.167-014 (Medical-Record Administrator) with a resulting SVP of 8 rather than under DOT code 075.167-014 (Quality Assurance Coordinator) with a SVP of 7. The Employer also argued that the CO never indicated whether he felt that the job requirements were too stringent or not stringent enough. In addition, the Employer states that it did not tailor the job to the alien’s qualifications. The alien has an M.D. degree and three years of experience as a physician while the Employer is only requiring a bachelor degree and one year of experience. The Employer argues that the alternative requirement of one year of experience as a physician is reasonable since such experience is suitable to evaluating clinical care records. It argues that a Bachelor degree in Medical Records Administration is offered by 69 colleges in the United States. The Employer acknowledges that a Bachelor degree in Medicine is not offered in the United States. It argues that such a degree is merely a descriptive term that encompasses 14 different health care degrees. In addition, this is a newly created position so there are no prior workers to report. (AF 36).

The CO issued a Final Determination (“FD”) on March 17, 1995, denying certification. (AF 17-19). The CO found that the Employer had failed to demonstrate the actual minimum requirements of the position because the requirements were tailored to match the alien’s qualifications and, the educational requirements are not appropriate.

On April 21, 1995, the Employer filed a timely Request for Review. (AF 1-8).

Discussion

Section 656.21(b)(5) provides that:

The employer shall document that its requirements for the job opportunity, as described, represent the employer's actual minimum requirements for the job opportunity, and the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer.

This section addresses the situation where an employer requires more stringent qualifications of a U.S. worker than it requires of the alien. An employer is not allowed to treat the alien more favorably than it would a U.S. worker. ERF Inc., d/b/a/ Bayside Motor Inn, 89-INA-105 (Feb. 14, 1990). An employer violates Section 656.21(b)(5) if it hired the alien with lower qualifications than it is now requiring and has not documented that it is not feasible to hire a U.S. worker without that training or experience. Capriccio's Restaurant, 90-INA-190 (Jan. 7, 1992). If an employer cannot demonstrate that the job requirements are the actual minimum ones or that it has not hired workers with less training and experience, then it can attempt to demonstrate that it is not feasible to hire workers with less training or experience than that required by the job offer. Section 656.21(b)(5).

Here, the Employer is requiring one year of experience in the job offered or one year of experience as a Physician. The alien lacks experience as a Transcription Quality Coordinator, but he does meet the alternative requirement of experience as a Physician. In addition, the Employer is requiring a Bachelor's degree in Medical Records Administration or Medicine. The alien does not have a degree in Medical Records Administration, but he does have an MD degree. Since the alien only meets the alternative requirements for the position, we must determine whether these requirements are reasonable. If the requirements are not reasonably related to the position and are tailored to the alien, then the Employer has failed to state the actual minimum requirements for the position. Francis Kellogg, 94-INA-465 (Feb. 2, 1998) (*en banc*); Intertech International, Inc., 96-INA-072 (July 21, 1997); Snowbird Development Co., 87-INA-546 (Dec. 20, 1988).

In the NOF, the CO found that the job requirements were not appropriate and were tailored to match the alien's background. We agree with the CO that the Employer failed to establish that the job requirements were appropriate for the position offered. The CO found that the degrees of Bachelor in Medicine and Bachelor in Medical Records Administration are not normally offered in the United States. In rebuttal, the Employer argued that 69 colleges offer degrees in Medical Records Administration. The Employer failed to provide any documentation to support this argument in its rebuttal. Instead, it sent to the CO, after the FD was issued, a list of colleges that offered the degree. (AF 13-22). Since this list was not timely submitted, we will not consider it. La Prarie Mining Limited, 95-INA-11 (Apr. 4, 1997). Standing alone, the Employer's bare assertion that the degree in medical records administration is normally offered in the U.S. is not persuasive. In addition, the Employer admits in its rebuttal that there are no U.S. colleges that offer a Bachelor's degree in

Medicine. It argues that a Bachelor's in Medicine is simply a general designation for 14 different health care degrees.² (AF 34). The Employer argues that job seekers would be able to understand that a Bachelor in Medicine is really a descriptive term for various health care degrees that the Employer would accept. This argument is undercut by the fact that the Employer rejected two U.S. applicants (Graff and Grembowicz), in part, because they did not have Bachelor degrees in Medicine; they had degrees in Health Care Management and Biology. (AF 112). Even if the Employer's contention is reasonable, such a description does not comply with the requirement that the Employer must state the actual minimum requirements for the position. See, e.g., Analysts International Corporation, 95-INA-62 (Dec. 23, 1996). Since the alien lacks a Bachelor degree in Medical Records Administration it appears that the alternative requirement of a Bachelor degree in Medicine was tailored to the alien's background.

We agree with the CO that the alternative requirement of experience as a Physician is not reasonably related to the job duties of the position offered. In its rebuttal, the Employer stated:

An individual who has experience as a physician is well suited to performing the job duties of the position both because he/she understands the medical aspects of the clinical and diagnostic procedures and because he/she has experience dealing with patients and their individual emotional support needs as well as their informational needs. A background as a physician prepares someone to be able to evaluate clinical care records to determine the medical needs of the patient against the levels of responsive and supportive care given. (AF 33).

The Employer also submitted a copy of the Occupational Outlook Handbook description of Health Services Managers. While it is unclear whether this description applies to Transcription Quality Coordinators, it does not indicate that experience as a Physician is appropriate for the position. Instead, it indicates that a degree in hospital administration, health administration or public health would be appropriate. In the FD, the CO stated: "It does not seem likely that Transcription Quality Coordinator positions require experience as a Physician." (AF 18). The Employer has failed to establish how experience as a Physician is related to the administrative duties of a Transcription Quality Coordinator. Since the alien lacks experience in the position offered, it appears that the alternative requirement of experience as a physician was tailored to the alien's background.

The Employer also argues that in the FD the CO mistakenly concluded that the alien's MD degree from Romania is not equivalent to an MD degree in the United States. We agree with the Employer that the CO was incorrect. The Report of Evaluation of Educational Credentials clearly states that the alien's degree in medicine is equivalent to the U.S. degree of Doctor of Medicine. (AF 44). However, this error is harmless since the issue is not whether the alien has an MD degree. The

² The Employer never identified all 14 of the degrees that it would accept, but it did provide a list of the following degrees: Sports Management, Sports Medicine, Premedicine, Prepharmacy, and Prevetinary. (AF 82-89). The Employer never explained how these degrees prepared an individual for a Transcription Quality Coordinator position.

Employer was only requiring a bachelor's degree. Since the Employer argues that the alien meets the educational requirement of the position with his MD degree, the CO's conclusion that the Employer accepted the MD degree as being the equivalent of a bachelor's degree must be correct. If not, then the alien does not meet the educational requirement of the position.

Finally, in its appeal, the Employer argues that the NOF was defective because the CO failed to give the Employer the option of amending the application to correct the job requirements. Even if the NOF is defective, any error is harmless. Since we find that the job requirements of the position are not appropriate, any amendments or deletions by the Employer would result in the alien not qualifying for the position.

We find that the job requirements are not related to the job duties of the position, and that the requirements are tailored to the alien. As such, the Employer failed to state the actual minimum requirements of the position. See, e.g., Intertech International, Inc., 96-INA-072 (July 21, 1997); Snowbird Development Co., 87-INA-546 (Dec. 20, 1988).

Order

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

DONALD B. JARVIS
Administrative Law Judge

San Francisco, California

DBJ/ck/vr